

No. PD-0025-21

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/3/2021
DEANA WILLIAMSON, CLERK

DANIEL GARCIA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Bell County
No. 03-19-00375-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant, Daniel Garcia.
- * The trial judge was the Honorable Fancy Jezek, 426th District Court, Bell County, Texas.
- * Counsel for the State at trial were Bob D. Odom and Anne M. Potts Jackson, P.O. Box 540, Belton, Texas 76513.
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No. PD-0025-21

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Appeal from Bell County
No. 03-19-00375-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant's challenge to the Attorney-General sexual-assault-forensic-exam scheme was procedurally defaulted. Alternatively, restitution for the victim's forensic exam payable to the Attorney General was proper. Additionally, the order was a valid reimbursement cost.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF THE CASE

Appellant was convicted of aggravated sexual assault, sentenced to twelve years' imprisonment, and ordered to pay the Attorney General \$1,000 restitution for the victim's forensic sexual assault exam. 10 RR 35; 1 CR 44. The court of appeals struck the restitution order because it did not compensate the victim for her loss or injury. *Garcia v. State*, No. 03-19-00375-CR, 2020 WL 4462805, at *1-2 (Tex. App.—Austin July 21, 2020, *reh'g denied* Dec. 14, 2020, pet. granted Apr. 21, 2021) (not designated for publication).

ISSUES PRESENTED

- 1. Is an objection required to preserve a challenge to restitution ordered payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam?**
- 2. Alternatively, does a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam qualify as victim compensation?**
- 3. Alternatively, is a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam a proper reimbursement cost?**

SUMMARY OF THE ARGUMENT

TEX. CODE CRIM. PROC. art. 42.037(a), (b)(2)(B) authorizes restitution, payable to the Attorney General, for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic exam. When such restitution is ordered, an objection is required to preserve a subsequent appellate challenge to the scheme. No objection was lodged here, so Appellant procedurally defaulted his complaint.

Alternatively, the scheme is a proper exercise of legislative authority to create a punishment applicable to an offense. And, as applied to Appellant, the scheme was directly related to his punishment: Appellant sexually assaulted the child-victim, the victim received the benefit of a forensic medical exam for possible use in the investigation and prosecution of Appellant, and the cost of the exam was assumed by the State with victim-compensation funds managed by the Attorney General. The Attorney General was therefore entitled to restitution for money paid on behalf of the victim.

Finally, even if this Court can override the authority of the Legislature, the order qualifies as a valid reimbursement cost.

ARGUMENT

1. Restitution Scheme for Forensic Sexual Assault Exams.

When Appellant committed the sexual-assault offense on December 6, 2018,

1 CR 44, TEX. CODE CRIM. PROC. art. 42.037(a) stated, in part:

In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or *to the compensation to victims of crime fund established under Subchapter B, Chapter 56*, to the extent that fund has paid compensation to or *on behalf of the victim*.

(emphasis added). Additionally, per Article 42.037(b)(2)(B): “If the offense results in personal injury to a victim, the court may order the defendant to make restitution to: . . . the compensation to victims of crime fund to the extent that fund has paid compensation to or *on behalf of the victim*.” (emphasis added).

2. Appellant’s Challenge to the Restitution Order was Procedurally Defaulted.

Restitution, like a fine, is part of punishment. *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006). At Appellant’s punishment hearing, the trial court imposed a \$1,000 restitution order payable to the Attorney General for the victim’s forensic exam. 10 RR 35 (“I’ll also order that you pay \$1,000 to the office of the attorney general as restitution in this case.”); 1 CR 44 (judgment). The Attorney General had reimbursed the Bell County District Attorney’s Office for the victim’s

sexual assault exam. Sealed 1 Supp. CR 71 (PSI Victim-Impact Statement documenting reimbursement for exam). Appellant did not object to the in-court assessment of the restitution when the judge asked if there was any reason why the sentence should not be imposed. 10 RR 35.

Appellant's claim cannot be construed as a sufficiency challenge. As framed by the court of appeals, Appellant's appeal challenged the propriety of the restitution order because it was directed to the Attorney General. *Garcia*, 2020 WL 4462805, at *1. This basis for his challenge is clear because he did not contest the fact that the victim received an exam or that the exam cost was \$1,000; he complained only that restitution to the Attorney General under Article 42.037(a), (b)(2)(B) was wholly improper. *See Idowu v. State*, 73 S.W.3d 918, 921 (Tex. Crim. App. 2002) ("If a defendant wishes to complain about the appropriateness of (as opposed to the factual basis for) a trial court's restitution order, he must do so in the trial court, and he must do so explicitly."). His contention went to the very heart of the Legislature's authority to authorize restitution to a state entity that made a payment on behalf of a victim for a service provided for the benefit of the victim. TEX. CODE CRIM. PROC. arts. 56.02, 56.06. Thus, his claim amounted to a challenge to the legality of Article 42.037's terms as applied to his punishment. *Cf. Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (raising defaulted as-applied challenge to the constitutionality

of the death-penalty punishment scheme in TEX. CODE CRIM. PROC. art. 37.071); *Ex parte Jimenez*, 364 S.W.3d 866, 882 (Tex. Crim. App. 2012) (Applicant forfeited his habeas claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), for failing to object at trial). Notably, as argued below, it is not outside the State's power to develop this type of punishment because it is rationally related to both the offense and the victim. *See* Part 3.D. *supra*. Appellant was therefore required to object in the trial court to preserve his claim for appellate review. *Idowu*, 73 S.W.3d at 921; *Curry*, 910 S.W.2d at 476; *Ex parte Jimenez*, 364 S.W.3d at 882. Instead of taking advantage of the full and fair opportunity he was given to object, Appellant affirmatively stated he had no objection. 10 RR 35; *compare with Burt v. State*, 396 S.W.3d 574, 577-78 (Tex. Crim. App. 2013) (Burt was excused from having to object to the restitution order at trial because he had no opportunity to object). This Court should hold that Appellant procedurally defaulted his restitution complaint.

3. The Restitution Order for the Victim's Sexual Assault Forensic Exam Payable to the Attorney General was Proper.

Alternatively, the Legislature designated the Attorney General as a *de jure* victim when it covers the cost of a forensic medical exam for a sexual assault victim. That determination should be upheld.

Crime-victim rights are constitutionally mandated. TEX. CONST. Art. I, § 30. A crime victim has "(1) the right to be treated with fairness and with respect for the

victim's dignity and privacy throughout the criminal justice process; and (2) the right to be reasonably protected from the accused throughout the criminal justice process.” TEX. CONST. Art. I, § 30(a). And it is the role of the Legislature “to define the term ‘victim’” and to enforce crime-victim rights. TEX. CONST. Art. I, § 30(c).

Toward that end, the Legislature created two related statutory schemes to address the rights and needs of sexual assault victims and society's need to prosecute and punish sexual assault offenders. Both Chapter 56 of the Code of Criminal Procedure and Chapter 323 of the Texas Health and Safety Code contained numerous provisions to guide law enforcement and sexual assault victims.

A. Historical Development of Sexual Assault Victim Rights Under TEX. CODE CRIM. PROC. Chapter 56.

i. The First Realization of Sexual Assault Crime-Victim Rights.

In 1985, the Legislature enacted the “Rights of Crime Victims” Act. Added by Acts 1985, 69th Leg., ch. 588 (H.B. 235), § 1, eff. Sept. 1, 1985; TEX. CODE CRIM. PROC. art. 56.02 (eff. Sept. 1, 1985). Chapter 56 was intended to fill a void in the criminal justice system experienced by crime victims. “Victim” was defined as “a person who is the victim of sexual assault . . . or who has suffered bodily injury or death as the result of the criminal conduct of another.” Acts 1985, 69th Leg., ch. 588 (H.B. 235), § 1, eff. Sept. 1, 1985; TEX. CODE CRIM. PROC. art. 56.01(3) (eff. Sept. 1, 1985). The Legislature acknowledged that there was no requirement that victims

“be contacted or otherwise considered in any phase of a criminal prosecution— from pretrial release, trial and sentencing, to release on parole.” H.B. 235 Committee on Criminal Jurisprudence Bill Analysis.¹ Thus, Chapter 56 was enacted to grant sexual assault victims, among others, the “right to be informed, to be heard, and to be protected.” H.B. 235 Committee on Criminal Jurisprudence Bill Analysis. An enumerated right in TEX. CODE CRIM. PROC. art. 56.02(6) included the right of sexual assault victims to receive information about compensation for a medical exam when a law enforcement agency requested it for use in an investigation and prosecution.² Acts 1985, 69th Leg., ch. 588 (H.B. 235), § 1, eff. Sept. 1, 1985; Acts 1973, 63rd Leg., ch. 299 (H.B. 857), § 1, eff. June 11, 1973; TEX. REV. CIV. STAT. ART. 4447m (eff. June 11, 1973). Originally, the legislation stated: “Any law enforcement agency that requests a medical examination for a victim of an alleged rape for use in the investigation or prosecution of the offense shall pay all costs of the examination.” TEX. REV. CIV. STAT. ART. 4447m. The intent was to shift the cost from the victim to the law enforcement agency because, at the time, victims were responsible for paying “for medical examinations made in connection with investigation or

¹ Available at:
https://lrl.texas.gov/LASDOCS/69R/HB235/HB235_69R.pdf#page=16.

² By contrast, law enforcement did not have to cover the cost for treatment of injuries. Acts 1973, 63rd Leg., ch. 299 (H.B. 857), § 2, eff. June 11, 1973.

prosecution of the offense.” H.B. 857 Committee on Criminal Jurisprudence Bill Analysis.³

In 1989, the cost-assuming provision was placed in TEX. CODE CRIM. PROC. art. 56.06: “(A) A law enforcement agency that requests a medical examination of a victim of an alleged sexual assault for use in the investigation or prosecution of the offense shall pay all costs of the examination.” Acts 1989, 71st Leg., ch. 2, § 5.05(a), eff. Aug. 28, 1989 (creating art. 56.06 and repealing ART. 4447m); TEX. CODE CRIM. PROC. art. 56.06 (eff. Aug. 28, 1989).

ii. More Notice About an Art. 56.06 Medical Exam.

Additional notice by law enforcement became a requirement in 1991. TEX. CODE CRIM. PROC. art. 56.07 required law enforcement, “at the earliest possible time after the initial contact,” to notify a sexual assault victim that payment for a medical exam conducted under Article 56.06 was part of the victim’s right to receive information about crime-victim compensation. Acts 1991, 72nd Leg., ch. 202, § 5, eff. Sept. 1, 1991; TEX. CODE CRIM. PROC. art. 56.07(2)(B) (eff. Sept. 1, 1991); *see also* Acts 2003, 78th Leg., ch. 788, § 1, eff. June 20, 2003 (renumbering (2)(B) to (a)(2)(B)).

³ Available at: https://lrl.texas.gov/LASDOCS/63R/HB857/HB857_63R.pdf.

iii. First-Time Attorney General Reimbursement with Crime-Victim Compensation Funds.

In 2001, the Attorney-General-reimbursement provision was added to Section 56.06(a):

On application to the attorney general, the law enforcement agency is entitled to be reimbursed for the reasonable costs of that examination if the examination was performed by a physician or by a sexual assault examiner or sexual assault nurse examiner, as defined by Section 420.003, Government Code.

Acts 2001, 77th Leg., ch. 1507, § 1, eff. June 15, 2001; TEX. CODE CRIM. PROC. art. 56.06(a) (eff. June 15, 2001). Consistent with this new language, the Attorney General was granted authority to use crime-victim-compensation funds to reimburse a law enforcement agency under TEX. CODE CRIM. PROC. art. 56.06(a). Acts 2001, 77th Leg., ch. 1507, § 1, eff. June 15, 2001; TEX. CODE CRIM. PROC. art. 56.54(k) (eff. June 15, 2001).

iv. 2005 Expansion of Victim Exam Rights.

In 2005, the rights of sexual assault victims were expanded: “a victim of a sexual assault, [has] the right to a forensic medical examination if the sexual assault is reported to a law enforcement agency within 96 hours of the assault.” Acts 2005, 79th Leg., ch. 498, § 1, eff. Sept. 1, 2005; TEX. CODE CRIM. PROC. art. 56.02(a)(14) (eff. Sept. 1, 2005). The duties of law enforcement were altered along with this expansion:

(a) If a sexual assault is reported to a law enforcement agency within 96 hours of the assault, the law enforcement agency, with the consent of the victim, a person authorized to act on behalf of the victim, or an employee of the Department of Family and Protective Services, shall request a medical examination of the victim of the alleged assault for use in the investigation or prosecution of the offense. A law enforcement agency may decline to request a medical examination under this subsection only if the person reporting the sexual assault has made one or more false reports of sexual assault to any law enforcement agency and if there is no other evidence to corroborate the current allegations of sexual assault.

(b) If a sexual assault is not reported within the period described by Subsection (a), on receiving the consent described by that subsection the law enforcement agency may request a medical examination of a victim of an alleged sexual assault as considered appropriate by the agency.

Acts 2005, 79th Leg., ch. 498, § 2, eff. Sept. 1, 2005; TEX. CODE CRIM. PROC. art. 56.06(a)-(b) (eff. Sept. 1, 2005).

v. 2013 Refinement of Sexual Assault Victim and Victim Rights.

In 2013, the definition of “victim” was refined to include a person who is a victim of an offense defined in TEX. PENAL CODE §§ 21.02 (continuous), 21.11(a)(1) (indecent by contact), 22.011 (sexual assault), or 22.021 (aggravated sexual assault).⁴ Acts 2013, 83rd Leg., ch. 1345 (S.B. 1192), § 1, eff. Sept. 1, 2013; TEX. CODE CRIM. PROC. art. 56.01(2-a), (3).

Next, the rights of sexual assault victims concerning disclosure became the

⁴ This was the last amendment to the definitions provision before Sept. 1, 2019, which is not applicable here.

focus of the Legislature with the enactment of TEX. CODE CRIM. PROC. art. 56.021:

(a) In addition to the rights enumerated in Article 56.02, if the offense is a sexual assault, the victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

(1) if requested, the right to a disclosure of information regarding any evidence that was collected during the investigation of the offense, unless disclosing the information would interfere with the investigation or prosecution of the offense, in which event the victim, guardian, or relative shall be informed of the estimated date on which that information is expected to be disclosed;

(2) if requested, the right to a disclosure of information regarding the status of any analysis being performed of any evidence that was collected during the investigation of the offense;

(3) if requested, the right to be notified:

(A) at the time a request is submitted to a crime laboratory to process and analyze any evidence that was collected during the investigation of the offense;

(B) at the time of the submission of a request to compare any biological evidence collected during the investigation of the offense with DNA profiles maintained in a state or federal DNA database; and

(C) of the results of the comparison described by Paragraph (B), unless disclosing the results would interfere with the investigation or prosecution of the offense, in which event the victim, guardian, or relative shall be informed of the estimated date on which those results are expected to be disclosed;

Acts 2013, 83rd Leg., ch. 1345 (S.B. 1192), § 3, eff. Sept. 1, 2013; TEX. CODE CRIM.

PROC. art. 56.021(a)(1)-(3) (eff. Sept. 1, 2013).

A victim's right to a forensic medical exam was reiterated in this provision as well:

(6) to the extent provided by Articles 56.06 . . . , for the victim of the

offense, the right to a forensic medical examination if, within 96 hours of the offense, the offense is reported to a law enforcement agency or a forensic medical examination is otherwise conducted at a health care facility.

Acts 2013, 83rd Leg., ch. 1345 (S.B. 1192), § 3, eff. Sept. 1, 2013; TEX. CODE CRIM. PROC. art. 56.021(a)(6) (eff. Sept. 1, 2013).

vi. Attorney General Payment for Victims for Medical Care.

Finally, in 2015, the Attorney General was authorized under Article 56.06 to “make a payment to or on behalf of an individual for the reasonable costs incurred for medical care provided in accordance with Section 323.004, Health and Safety Code.”

Acts 2015, 84th Leg., ch. 924 (H.B. 1446), § 3, eff. Sept. 1, 2015; TEX. CODE CRIM. PROC. art. 56.06(f) (eff. Sept. 1, 2015). The intent of this provision was to prevent victims from being held responsible for the cost to “promptly preserve crucial, perishable forensic evidence.” H.B. 1446 Criminal Jurisprudence Substituted Committee Report Bill Analysis.⁵

B. The Culmination Cost-Assuming Chapter 56 Provisions Applicable Here.

Now that the relevant history of Chapter 56 has been examined, it is necessary

⁵ Available at:
<https://capitol.texas.gov/tlodocs/84R/analysis/pdf/HB01446H.pdf#navpanes=0>.

to turn to the provisions applicable in this case.⁶ A sexual assault victim under the Crime Victims Rights Act was required to receive information about the payment for an exam under Article 56.06. TEX. CODE CRIM. PROC. art. 56.02(a)(6) (Article 56.02 was last amended in 2015). For victims who reported the assault within 96 hours, the law enforcement agency was required to request the exam, with the victim’s consent, “for use in the investigation or prosecution of the offense”; the agency acting under this authorization was required to pay for the exam. TEX. CODE CRIM. PROC. art. 56.06(a), (c). If the assault was reported outside the 96-hour window, a law enforcement agency could exercise its discretion and request an exam with the victim’s consent. TEX. CODE CRIM. PROC. art. 56.06(b). In turn, “the law enforcement agency [was] entitled to be reimbursed for the reasonable costs of that examination if the examination was performed by a physician or by a sexual assault

⁶ Article 56.06 applied in this case because the assault was reported to law enforcement and the exam was presumably completed before April 8, 2019. Sealed 1 Supp. CR 71 (PSI Victim-Impact Statement documenting reimbursement for exam); 6 RR 41. The last relevant amendment period for Article 56.06 was in 2015.

The applicable versions of Chapter 56 in effect after September 1, 2019 do not apply. *See* Acts 2019, 86th Leg., ch. 1037 (H.B. 616), § 9, eff. Sept. 1, 2019 (“The change in law made by this Act applies to a forensic medical examination that occurs on or after the effective date of this Act. A forensic medical examination that occurs before the effective date of this Act is governed by the law as it existed immediately before that date, and the former law is continued in effect for that purpose.”). Since 2021, Subchapter F of Chapter 56A of the Code of Criminal Procedure now governs forensic testing for sexual assault victims. Acts 2019, 86th Leg., ch. 469 (H.B. 4173), § 1.05, eff. Jan. 1, 2021.

examiner or sexual assault nurse examiner, as defined by Section 420.003, Government Code.” TEX. CODE CRIM. PROC. art. 56.06(c). Additionally, “[t]he attorney general [could] make a payment to or on behalf of an individual for the reasonable costs incurred for medical care provided in accordance with Section 323.004, Health and Safety Code.” TEX. CODE CRIM. PROC. art. 56.06(f).

C. Development of Sexual Assault Victim Rights Under TEX. HEALTH & SAFETY CODE Chapter 323.

As victim rights were being enlarged in Code of Criminal Procedure Chapter 56 in 2005, complimentary enactments were made in the Texas Health and Safety Code. Texas Health and Safety Code Chapter 323’s predecessor, Chapter 322,⁷ was enacted in 2005 for the benefit of sexual assault survivors. Acts 2005, 79th Leg., ch. 934, § 1, eff. Sept. 1, 2005. Recognizing that “[s]exual assault victims require specific and unique requirements for their treatment,” the legislative objective was to increase the availability of treatment and remedy “substandard and inadequate” care provided by Texas’ emergency rooms. C.S.H.B 677 House Committee Substitute Bill Analysis.⁸

Some of the “specific and unique” treatment issues that accompany emergency

⁷ Chapter 323 was originally numbered as Chapter 322. Acts 2005, 79th Leg., ch. 934, § 1, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 921, § 17.001(47), eff. Sept. 1, 2007 (non-substantive revision moving provisions from Chapter 322 to 323).

⁸ Available at https://lrl.texas.gov/LASDOCS/79R/HB677/HB677_79R.pdf.

care for sexual assault victims were addressed by the Legislature throughout the years. Health care facilities were required to provide a victim with:

- (2) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;
- (3) access to a sexual assault program advocate, if available, as provided by Article 56.045, Code of Criminal Procedure;
- (4) the information form required by Section 323.005;
- (5) a private treatment room, if available;
- (6) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and
- (7) the name and telephone number of the nearest sexual assault crisis center.

TEX. HEALTH & SAFETY CODE § 323.004(b)(2)-(7) (eff. June 19, 2009 until Jan. 1, 2021's creation of Article 56A). A qualified forensic examiner was also required.

TEX. HEALTH & SAFETY CODE §§ 323.004(b-1), 323.0045 (eff. Sept. 1, 2013).

Additionally, TEX. HEALTH & SAFETY CODE § 323.005(a) mandated that the victim be notified about the forensic-exam process, related health concerns, and certain entitlements. Victims were required to receive a standardized form that included:

- (1) a detailed explanation of the forensic medical examination required to be provided by law, including a statement that photographs may be taken of the genitalia;
- (2) information regarding treatment of sexually transmitted infections and pregnancy, including:
 - (A) generally accepted medical procedures;
 - (B) appropriate medications; and
 - (C) any contraindications of the medications prescribed for treating sexually transmitted infections and preventing

- pregnancy;
- (3) information regarding drug-facilitated sexual assault, including the necessity for an immediate urine test for sexual assault survivors who may have been involuntarily drugged;
- (4) information regarding crime victims compensation, including:
- (A) a statement that:
 - (i) a law enforcement agency will pay for the forensic portion of an examination requested by the agency under Article 56.06, Code of Criminal Procedure, and for the evidence collection kit; or*
 - ...
 - (B) reimbursement information regarding the reimbursement of the survivor for the medical portion of the examination;

TEX. HEALTH & SAFETY CODE § 323.005(a) (eff. Sept. 1, 2009 until Jan. 1, 2021) (emphasis added); *see also* TEX. HEALTH & SAFETY CODE § 323.0051 (eff. Sept. 1, 2017) (information that must be provided to victims who arrive at a non-SAFE-ready facility).

A balance between the victim's desire to seek justice and the victim's right to privacy and further unwanted intrusion was taken into account as well. TEX. HEALTH & SAFETY CODE § 323.004 authorized law enforcement to request, with the victim's consent, that a health care provider conduct a forensic exam at the same time as giving medical treatment:

- (b) A health care facility providing care to a sexual assault survivor shall provide the survivor with:
 - (1) subject to Subsection (b-1), a forensic medical examination in accordance with Subchapter B, Chapter 420, Government Code, if the examination has been

requested by a law enforcement agency under Article 56.06, Code of Criminal Procedure,

. . . .

(c) A health care facility must obtain documented consent before providing the forensic medical examination and treatment.

TEX. HEALTH & SAFETY CODE § 323.004(b) (in effect from Sept. 1, 2009 until Jan. 1, 2021), (c) (in effect Sept. 1, 2007 until Sept. 1, 2019). Consent from the victim was generally required for the collection-kit evidence to be released to law enforcement. TEX. GOV'T CODE § 420.0735 (eff. Sept. 1, 2011); *but see* TEX. GOV'T CODE § 420.074 (notwithstanding § 420.0735, the kit can be subpoenaed for use in a criminal investigation or proceeding).

D. The Attorney-General Restitution Scheme is a Legislative Prerogative that Must Be Given Effect by the Judiciary.

The Austin Court of Appeals held that the \$1,000 restitution order to the Attorney General was improper because it did not compensate the sexual assault victim for a loss or injury or a party who compensated the victim for a loss or injury. *Garcia*, 2020 WL 4462805, at *1-2. It remarked, “There was no testimony or other evidence that the victim either paid or was responsible for paying for any part of the cost of the examination conducted by the sexual assault nurse examiner or that the victim incurred any costs associated with the exam.” *Id.* at *2.

i. The Interrelated Doctrines of Political Question and Separation of Powers Compel this Court to Approve the Scheme.

The lower court’s analysis missed the forest for the trees. It applied case law defining who a “victim” is in the general sense. *See, e.g., Hanna v. State*, 426 S.W.3d 87, 92-95 (Tex. Crim. App. 2014) (determining whether a victim for purposes of restitution could be a utility company in a DWI case because victim is statutorily undefined). But whether the restitution scheme comports with this Court’s prior decisions defining who a victim is for purposes of restitution is a non-issue here. TEX. CODE CRIM. PROC. art. 42.037(a), (b)(2)(B)’s phrase “on behalf of a victim” takes into account payment made for the benefit of a victim with the use of crime-victim-compensation funds. This is a classic subjugation, and the propriety of this scheme is a matter for the Legislature to settle. As explained in detail above, *see* Part 3 *supra*, for over forty years, as a matter of public policy, the people of Texas through their elected representatives have agreed to step in and assume that monetary cost for the benefit of the victim. And it is not within this Court’s authority to second-guess the Legislature’s political-question determination or override it. *See State v. Rhine*, 297 S.W.3d 301, 305-06 (Tex. Crim. App. 2009) (“The legislature . . . declares the public policy of the state and may depart from established public policy, reshape it, or reform it.”). Nor does anything in *Hanna v. State* purport to compel a contrary conclusion. 426 S.W.3d at 92-95. In sum, a decision to strike down the sexual-

assault-forensic-exam-restitution scheme based on this Court’s own definition of victim eligibility would violate separation of powers. *See Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017) (“Judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”) (citation omitted).

ii. Subjugation Does Not Preclude Perpetrator Responsibility.

That the State protects victims from this cost should not relieve the perpetrator of responsibility of paying the price for their abusive conduct. That is one of the purposes of restitution—to punish. *See Hanna*, 426 S.W.3d at 91 (“Restitution serves multiple purposes, including restoring the victim to the status quo and forcing an offender to address and remedy the specific harm that he has caused.”); *Campbell v. State*, 5 S.W.3d 693, 697 (Tex. Crim. App. 1999) (restitution requires the defendant to pay the costs associated with an offense for which he is criminally liable). As a result, it was entirely rational for the State to set up a means—through punishment in Article 42.037(a), (b)(2)(B)—to recover the cost it assumed on behalf of a sexual assault victim. *See Hanna*, 426 S.W.3d at 93 (“there must be a causal connection between the criminal offense and the recipient of restitution.”); *Rhine*, 297 S.W.3d at 306 (the Legislature “also has exclusive dominion over the fixing of penalties for offenses under the state’s penal laws.”); *Oliva v. State*, 548 S.W.3d 518, 526 (Tex. Crim. App. 2018) (“the legislature can assign an offense level listed in the Penal

Code, with its preset punishment range.”).

By assuming the cost, the State acted as a third-party facilitator—like a health insurance company—that assumed a specific financial responsibility for a service provided for the victim as a result of the offense. *See Hanna*, 426 S.W.3d at 93 (“a restitution order is limited to only the losses or expenses that the victim or victims suffered as a result of the offense for which the defendant was convicted.”) (quoting *Cabla v. State*, 6 S.W.3d 543, 546 (Tex. Crim. App.1999)), 97 (restitution proper for unnamed victim for which the defendant’s conduct was a “but for” cause). If a victim’s insurance company paid a claim for the exam or evidence collection on the victim’s behalf, the victim’s insurance company would have been entitled to restitution. *See, e.g., Narvaez v. State*, 40 S.W.3d 729, 730 (Tex. App.—San Antonio 2001, pet. dismissed) (restitution to medical facility that treated the victim’s injuries); *Jones v. State*, 713 S.W.2d 796, 797 (Tex. App.—Tyler 1986, no pet.) (restitution to an insurance company used to pay the victim’s medical bills); *Harrison v. State*, 713 S.W.2d 760, 765 (Tex. App.—Houston [14th Dist.] 1986, pet. ref’d) (restitution to insurance company that paid victim’s hospital expenses; insurance company was a “victim” of the crime). The statutory scheme here was no different and should be treated as equally permissible. It cannot therefore be reasonably said, as the court appeals did, that payment by “the Attorney General did not compensate the victim for any loss or injury.” *Garcia*, 2020 WL 4462805, at *2.

iii. The Victim is a Direct Beneficiary of the Exam.

Lastly, any attempt to separate the sexual assault victim from the Attorney General for purposes of restitution, as done by the Austin court, must fail. *Garcia*, 2020 WL 4462805, at *1-2. The cost assumed by the State is directly related to the victim’s compensation as a beneficiary of a free forensic exam. As previously noted, TEX. CODE CRIM. PROC. art. 42.037(a), (b)(2)(B)’s phrase “on behalf of a victim,” obviously presumes that the victim is the beneficiary of an exam. Indeed, it is the victim of sexual assault who suffers a recognized physical and psychological harm. And a victim, like society in general, has a vested interest in seeing a perpetrator investigated, prosecuted, and punished. *See, generally, Meadoux v. State*, 325 S.W.3d 189, 195 (Tex. Crim. App. 2010) (“Four goals of penal sanctions have been recognized as legitimate: retribution, deterrence, incapacitation, and rehabilitation.”); *see also* TEX. CODE CRIM. PROC. art. 56.311 (express legislative intent for crime-victim’s compensation fund). As the Legislature has recognized, forensic evidence is of great value—even crucial at times—to any sexual assault prosecution. H.B. 1446 Criminal Jurisprudence Substituted Committee Report.⁹ Therefore, the Legislature balanced a victim’s right to privacy and medical care with a victim’s and society’s interest in prosecution and punishment by having the State directly absorb

⁹ Available at:
<https://capitol.texas.gov/tlodocs/84R/analysis/pdf/HB01446H.pdf#navpanes=0>.

the cost of the exam so a victim can have the benefit of forensic evidence collection and preservation. *See, generally*, TEX. CODE CRIM. PROC. art. 56.311 (there is a need to compensate victims who suffer personal because they may “incur financial burdens” and compensation “encourage[s] greater public cooperation in the successful apprehension and prosecution of criminals.”).

The particular personal interests of sexual assault victims was clearly prioritized by the Legislature in the statutory scheme. First, the victim controlled access to any forensic evidence; the initiation of a forensic exam was contingent on victim consent. TEX. HEALTH & SAFETY CODE § 323.004(c); TEX. CODE CRIM. PROC. art. 56.06(b). So, without the victim’s cooperation, no evidence could be discovered or collected by a professional examiner. Further, in an apparent effort to reduce a victim’s exposure to more trauma, the scheme contemplated that the forensic exam would be conducted at the same time that the victim would receive medical treatment. TEX. HEALTH & SAFETY CODE § 323.004(b), (c). Finally, TEX. CODE CRIM. PROC. art. 56.021 specifically granted rights to victims, which included, *inter alia*, the disclosure of the status of an analysis, notice of when a request for analysis is submitted, and the time a request for any biological evidence comparison is made and the results of any comparison. *See* Part 3.A.v. *supra* (citing TEX. CODE CRIM. PROC. art. 56.021(a)(3)(A)-(C)).

Further, when sexual-assault-forensic services were provided under Chapter

323, Texas Health and Safety Code, then the victim received a direct benefit by having the evidence of the crime collected by a specialized examiner for proper preservation.¹⁰ *See* TEX. GOV'T CODE §§ 420.003(5)-(6) (defining sexual assault examiner and nurse examiner), 420.031 (Attorney General must develop and distribute collection protocol and list requirements for evidence collection kit and preservation); TEX. HEALTH & SAFETY CODE § 323.0045 (exam training required). The exam thus constituted a form of compensation for a victim for the loss and injury suffered. *See Hanna*, 426 S.W.3d at 94 (“‘victim’ is any person who suffered loss as a direct result of the criminal offense.”).

4. The Attorney General Restitution Order was a Valid Reimbursement Cost.

Finally, even assuming that this Court is free to disregard the word of the Legislature as to restitution, the cost should be upheld as a legitimate reimbursement cost. While the cost has been titled “restitution” as a matter of form, TEX. CODE CRIM. PROC. art. 42.037(a), (b)(2)(B) operates to reimburse the State for money expended toward an investigation and prosecution. TEX. CODE CRIM. PROC. art. 56.06(c); 10 RR 35; 1 CR 44. And this Court has determined that statutes imposing

¹⁰ TEX. CODE CRIM. PROC. art. 56.06(a) and (b) were enacted with the intent to “insure that a victim of sexual assault has the ability to have their physical state evaluated and to preserve potential evidence of their alleged assault.” C.S.H.B.544 Law Enforcement Committee Bill Analysis available at, <https://capitol.texas.gov/tlodocs/79R/analysis/pdf/HB00544H.pdf#navpanes=0>.

costs that “reimburse criminal justice expenses incurred in connection with the defendant’s particular criminal prosecution” are permissible. *Allen v. State*, 614 S.W.3d 736, 746 (Tex. Crim. App. 2019). This Court should uphold the order here because it reimbursed the State for an investigation expense and Appellant’s prosecution. *See id.* at 745 (“When a court-cost statute seeks to recoup expenses legitimately incurred in connection with the prosecution of a defendant’s criminal case, then the collection of such fees is a proper part of the judicial function[.]”).

PRAYER FOR RELIEF

The State prays that this Court reverse the court of appeals' decision striking the restitution order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 5,559 exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on June 2, 2021, via email or certified electronic service provider to:

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